No. 87840

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

JOHN BURGIN,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 20
The Honorable Colleen Dolan, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions of two counts of sexual misconduct involving a child, ə 566.083.1, RSMo Cum. Supp. 2004, obtained in the Circuit Court of St. Louis County, the Honorable Colleen Dolan presiding. For those offenses, appellant was sentenced to serve two concurrent terms of four years in the Missouri Department of Corrections. After an opinion reversing and remanding, the Court of Appeals, Eastern District, transferred this case to this Court; thus, this Court has jurisdiction. MO. CONST., Art. V, ə 10.

STATEMENT OF FACTS

Appellant, John Burgin, was charged by indictment with two counts of sexual misconduct involving a child, ə 566.083.1, RSMo Cum. Supp. 2004, and one count of sodomy in the first degree, ə 566.062, RSMo 2000 (L.F. 6-7). Prior to trial, the state elected not to proceed on the charge of sodomy (Tr. 4). After a trial by jury, appellant was found guilty of each count of sexual misconduct involving a child (Tr. 383). Appellant does not contest the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the facts were as follows:

In November, 2003, appellant was involved in a relationship with Rachel Slusser, the mother of six-year-old D.H. and three-year-old C.H., the victims in this case (Tr. 185, 206, 238-240). Appellant and Slusser had been dating for a few months, and appellant had, on occasion, gone on family outings and visited the family at their home in Florissant, Missouri (Tr. 240-241, 252).

On November 5, 2003, Slusser asked appellant to watch D.H. and C.H. while she ran some errands (Tr. 241). While Slusser was out, appellant wrestled with D.H. (Tr. 180). After wrestling, appellant wanted to show D.H. and C.H. Asomething≅ (Tr. 183-184, 208, 272). He then pulled out his penis and manipulated it with his hand, giving himself an erection (Tr. 184, 208, 221-222, 243, 271). Appellant said his penis was Agrowing,≅ and he wanted the boys to touch his penis (Tr. 184, 243). He asked D.H. to rub his penis, but D.H. said that was Agross≅ and ran into his bedroom (Tr. 271-272).

The next morning, November 6, Slusser dropped off D.H. and C.H. at their father=s house (Tr. 241-242). Andrea Douglas, the victims= aunt, was there to babysit them while their father and stepmother were at work; she took their coats and told them to go and play (Tr. 206-207). As she was hanging up their coats, D.H. walked up to her and told her that AJohn,≅ who Asometimes lives with his mom,≅ Ahad a big wee-wee . . . that grows≅ (Tr. 207-208). D.H. explained that appellant had taken Ait out and show[n] it to≅ C.H. and him (Tr. 208). Douglas then contacted the victims= father (Tr. 208-209).

When the victims= father came home, D.H. told him what had happened the night before (Tr. 221-222). D.H. also told his mother, who arrived shortly thereafter (the victims= father had contacted her after hearing from Douglas) (Tr. 242-243). They then went to the police station and made a report (Tr. 243, 269-272).

Thereafter, on November 20, 2003, D.H. was interviewed at a child advocacy center, and he told the interviewer what appellant had done (Tr. 281, 290-291; State=s Ex. 2). In December 2003, appellant moved to Florida, forcing the state to extradite him back to Missouri to face the charges (Tr. 331, 333-334).

At trial, which commenced on February 22, 2005, appellant denied knowingly exposing himself to D.H. and C.H. (Tr. 315). He claimed that D.H. had punched him in the groin after appellant would not allow D.H. to play Nintendo, and that D.H. had then opened the bathroom door while appellant was Achecking [him]self . . . to make sure there was no bruising, or whatever, from being hit≅ (Tr. 321).

On February 24, 2005, the jury found appellant guilty of both counts of sexual misconduct involving a child (L.F. 39-40; Tr. 383). Appellant waived jury sentencing, and on April 18, 2005, the court sentenced appellant to two concurrent four-year terms (L.F. 47-49; Tr. 391).

On May 16, 2006, the Court of Appeals, Eastern District, reversed appellant=s convictions. Citing *State v. Beine*, 162 S.W.3d 483 (Mo. banc 2005), the Court of Appeals concluded that in *Beine*, this Court had found ə 566.083.1.(1) to be Apatently unconstitutional.≅ Thus, the Court concluded that appellant=s convictions under the same statute could not stand.

On July 5, 2006, the Court of Appeals granted respondent=s application for transfer.

ARGUMENT

I.

Because ə 566.083.1.(1), RSMo Cum. Supp. 2004, is not an unconstitutional statute (and because it has only been deemed unconstitutional in non-binding *dicta*), the trial court did not plainly err in entering judgment and sentence on each count of sexual misconduct involving a child.

Appellant contends that the trial court plainly erred in entering judgment and sentence on each count of sexual misconduct involving a child (App.Sub.Br. 15). Relying on analysis in *State v. Beine*, 162 S.W.3d 483 (Mo. banc 2005), appellant argues that this Court has declared ə 566.083.1.(1) B the subdivision under which he was convicted B unconstitutional (App.Sub.Br. 15).

But, inasmuch as the constitutionality analysis of the majority opinion in *Beine* is non-binding *dicta*, appellant is incorrect in his assertion that the Court has declared ə 566.083.1.(1) unconstitutional. Additionally, because the statute is not unconstitutional B either on its face or as applied to appellant B the trial court did not plainly err in entering judgment and sentence.

A. Because the Majority Opinion in *Beine* Wholly Disposed of the Case by Finding the Evidence Insufficient on All Counts, the Secondary Analysis Regarding the Constitutionality of ə 566.083.1.(1) is Non-binding *Dicta*

Before discussing the constitutionality of ə 566.083.1.(1), the Court in *Beine* analyzed

the sufficiency of the evidence and concluded that Aon all four counts . . . the evidence adduced by the state at trial [was] insufficient to convict Mr. Beine of any of the charges.≅ *State v. Beine*, 162 S.W.3d at 485. Accordingly, the Court reversed all four convictions and remanded the case with directions to the trial court to enter judgments of acquittal on all four counts. *Id*. at 488.

This was the primary holding of the Court, and, while the Court also analyzed and discussed the constitutionality of ə 566.083.1.(1), it is apparent, in light of the Court=s ultimate judgment, that the majority decided this case based on the insufficiency of the evidence. *Id*. at 485. Indeed, in stating its judgment, the Court summarized its holding without making reference to the constitutionality of the statute in question:

> The judgment on all counts is reversed. Inasmuch as the state has had an opportunity of proving its case, and has failed to do so, double jeopardy prohibits a retrial. The case, then, should be remanded with directions to enter judgment of acquittal on all counts.

Id. at 488.

Thus, inasmuch as the Court wholly disposed of the case against Mr. Beine based on the insufficiency of the evidence to support his convictions, the Court=s additional discussion regarding the constitutionality of ə 566.083.1.(1), was not an essential aspect of the opinion. To the contrary, the constitutionality analysis of the majority opinion was extraneous to the Court=s holding and did not affect the outcome of the case in any fashion. Accordingly, that

aspect of the case should be deemed *dicta*. *See Brooks v. State*, 128 S.W.3d 844, 852 n. 1 (Mo. banc 2004) (A[S]tatements ... are *obiter dicta* [if] they [are] not essential to the court=s decision of the issue before it.≅) (White, C.J., dissenting); *Muench v. South Side Nat'l Bank*, 251 S.W.2d 1, 6 (Mo. 1952) (A*Obiter dicta*, by definition, is a >gratuitous opinion.=≅).[1]

[1] It is, of course, true that ordinarily A[t]his Court will not address a constitutional question if the case can be fully determined without reaching it.≅ *See State v. Eisenhouer*, 40 S.W.3d 916, 919 (Mo. banc 2001). But a natural corollary to this rule is that if a case is Afully determined without reaching≅ the constitutional question, then any subsequent discussion about the constitutional question is properly deemed *dicta*.

And, if *dicta*, then that aspect of the *Beine* opinion is not binding precedent and should not be cited as such. *See Muench v. Southside Nat=l Bank*, 251 S.W.2d at 6. AAn *obiter dictum*, in the language of the law, is a gratuitous opinion B an individual impertinence[2] B which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it.≅ *Id*. In short, while it is the Court=s prerogative to determine the constitutionality of statutes when challenged, respondent submits that the Court has yet to make a binding determination as to ə 566.083.1.(1), RSMo Cum. Supp. 2004.

In response to this argument, appellant asserts that respondent is attempting to argue that the Court (in stating that the statute was Apatently unconstitutional≅) Ameant something else entirely≅ (App.Sub.Br. 18). But that is not the case.

Respondent does not question the meaning of the words Apatently unconstitutional,≅ as they were used in the *Beine* opinion. Rather, respondent simply points out that the words were part of a discussion that was wholly extraneous to the actual holding of the Court. And, if extraneous to the holding of the Court, then unless and until such analysis is adopted by the Court as an actual holding, such language is properly deemed *dicta*. In other words,

[2] This word is evidently used in its primary sense (i.e., a thing not pertinent), and not to imply insolence or impudence.

respondent simply concludes, based on the language of the *Beine* opinion, that the Court has not, in fact, held what appellant asserts it has held.

Appellant disagrees, arguing: Athis Court made its choice to address the validity of the statute, and held it to be unconstitutional, and that should end the matter≅ (App.Sub.Br. 18). But such an immutable rule would have the effect of rendering virtually all *dicta* binding. For if a Court has no ability to examine prior decisions and determine what, in fact, was the holding of the case (as opposed to what might have been *dicta*) then the Court must accept every utterance as binding. That, of course, is not the rule, for Courts often examine prior decisions and decline to rely on even substantial portions of those decisions because they were, in fact, *dicta*. *See e.g. Swisher v. Swisher*, 124 S.W.3d 477, 482 (Mo.App. W.D. 2003) (declining to rely on a lengthy discussion of a Agood faith≅ requirement discussed in *McDonald v. Burch*, 91 S.W.2d 660, 663-664 (Mo.App. W.D. 2002), because it was *dicta*).

Respondent agrees with appellant that ultimately Ait is for this Court, not the State, to decide what was >essential= to its decision in *Beine*≅ (App.Sub.Br. 19). But, having said that, respondent would simply reiterate, consistent with the principles cited above, that Mr. Beine=s case was wholly resolved by a determination that the evidence was insufficient to support any of his convictions. Thus, it appears B and it is reasonable to conclude B that the secondary analysis in *Beine* was *dicta*.[3]

[3] It must be noted, as appellant alludes to in his brief (App.Sub.Br. 21, n. 9), that in one other case, a conviction under this statute has been upheld even after *Beine*. Thus, it

would appear that, in at least one case, the Court of Appeals did not feel bound by the secondary analysis of *Beine*. *See* the appellant=s Application for Transfer in *State v. Pleasant Hurst*, No. SC87299 (application for transfer, in which the defendant argued that his conviction under ə 566.083.1.(1) was unconstitutional, was denied on January 31, 2006). (Respondent respectfully requests that this Court take judicial notice of the contents of its file in that case; a copy of the defendant=s application for transfer is included in the Appendix to this brief.)

Appellant points out that the three dissenters in *Beine* (in discussing the constitutionality of ə 566.083.1.(1)) did not Achallenge whether the [majority] should even have reached that issue≅ (App.Sub.Br. 20). But while it might be sometimes done, a dissenting opinion is under no obligation to point out whether any part of the majority opinion is *dicta* (even if an application of Ajurisprudential principles≅ would lead to that conclusion). Indeed, a dissenting judge might prefer *not* to point out that a disagreeable aspect of the majority is mere *dicta*, for if it remains *dicta*, then its application might more easily be limited in subsequent cases. In short, to speculate about why a dissenting opinion did not challenge a portion of the majority as *dicta* is ultimately fruitless: the constitutionality analysis in *Beine* is either *dicta* or it is not; and, here, respondent submits that the analysis in question was, in fact, *dicta*.[4]

In short, because the constitutionality analysis of the majority opinion in *Beine* was merely *dicta*, appellant is not entirely incorrect when he asserts that Athe State=s entire argument attempting to sustain [his] conviction under ə 566.083.1.(1) has been considered, and rejected by this Court≅ (App.Sub.Br. 22). For unless and until this Court adopts the

[4] The dissent, of course, was obligated to discuss the constitutionality of the statute, for it did not agree that the evidence was insufficient on all counts.

Beine analysis as its actual holding, the statute has not been *held* to be unconstitutional.

B. Because There Was No Objection at Trial or at Any Time Prior to Appeal, Appellant=s Implicit Challenge to the Constitutionality of ∋ 566.083.1.(1) Was Not Preserved For Review

Absent a binding prior determination that ∋ 566.083.1.(1) is unconstitutional on its face, appellant=s claim boils down to a newly-asserted claim that the statute is unconstitutional. But, because appellant failed to raise such a claim at any time prior to appeal, such a claim was not preserved for review.

At trial, appellant never alleged that ∋ 566.083.1.(1) was unconstitutional. He filed no pre-trial motion arguing that ∋ 566.083.1.(1) was unconstitutional, and he made no objection along those lines at any time B either during trial or in his motion for new trial.

Missouri has always adhered to the rule that to preserve a constitutional issue for appellate review, it must be raised at the earliest time consistent with good pleading and orderly procedure. *State v. Flynn*, 519 S.W.2d 10, 12 (Mo. 1975). In *Flynn*, for example, the defendant on appeal contended that the statute under which he was convicted was unconstitutionally vague and overbroad when applied to him. *Id*. In that circumstance, the court said that A[t]he earliest possible moment consistent with good pleading and orderly procedure in which a party may raise a constitutional issue pertaining to the information or indictment is in a motion to dismiss or to quash pursuant to Rules 25.05 and 25.06.≅ *Id*. AThe constitutional issue cannot be preserved for appellate review by mentioning it for the

first time in a motion for new trial.≅ *Id*.

Here, the earliest moment that appellant could have raised his challenge to the constitutionality of ə 566.083.1.(1) was immediately after the indictment was filed on January 28, 2004 (L.F. 1-2, 6). As stated above, however, appellant did not challenge the constitutionality of the statute. Thus, A[i]nasmuch as no constitutional challenge to the statute . . . was made . . . , the constitutional issue has not been preserved for review.≅ *State v. Belcher*, 805 S.W.2d 245, 251 (Mo.App. S.D. 1991).

AThe general rule is that constitutional questions are deemed waived that are not raised at the first opportunity consistent with good pleading and orderly procedure.≅ *City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 378 (Mo. banc 1991). AAttacks on the constitutionality of a statute are of such dignity and importance that raising such issues as an afterthought in the brief on appeal will not be tolerated.≅ *Id*. Accordingly, this point should be denied. *See State v. Long*, 972 S.W.2d 559, 563 (Mo.App. W.D. 1998) (summarily denying challenge to constitutionality of ə 491.075 that was raised for the first time on appeal).

C. Section 566.083.1.(1), RSMo Cum. Supp. 2004 Was Not Unconstitutionally Applied to Appellant, and it is Not Facially Unconstitutional

The majority opinion in *Beine* stated that ə 566.083.1.(1) was overbroad, and that the defendant had standing to challenge the statute because it Aprohibit[ed] conduct to which he [was] constitutionally entitled to engage in,≅ namely, urinating in a public restroom (conduct

that the majority stated was Alawful, and necessary, conduct≅). 162 S.W.3d at 486-488. These conclusions, however, should not or do not apply to appellant for at least two reasons: first, as set forth above, the discussion in *Beine* regarding the constitutionality of ə 566.083.1.(1) is or *dicta*; and second, appellant lacks standing to assert overbreadth, because unlike the defendant in *Beine* (who urinated in a public restroom), appellant=s conduct in manipulating his penis in front of two young boys, in their apartment, was not Alawful, and necessary, conduct.≅

1. The Standard of Review

The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional. *State ex rel. Zobel v. Burrell,* 167 S.W.3d 688, 692 (Mo. banc 2005). AAll statutes are presumed to be constitutional, and a statute will not be held unconstitutional unless >it clearly and undoubtedly contravenes the constitution.=≅ *State v. Pike,* 162 S.W.3d 464, 470 (Mo. banc 2005). ≅A statute will be enforced unless it >plainly and palpably affronts fundamental law embodied in the constitution.=≅ *Id*. ADoubts will be resolved in favor of the constitutionality of the statute.≅ *Id*. AThis Court determines issues of law, including the constitutionality of Missouri statutes, *de novo*.≅ *Kirkwood Glass Company, Inc. v. Director of Revenue,* 166 S.W.3d 583, 585 (Mo. banc 2005).

2. Except as applied to his own conduct, appellant lacks standing to challenge ə 566.083.1.(1)

AA party has standing to challenge the constitutionality of a statute only insofar as it

has an adverse impact on his own rights.≅ *County Court of Ulster County, N. Y. v. Allen*, 442 U.S. 140, 154-155 (1979). AAs a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.≅ *Id*.

AA limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment.≅ *Id*. AThis exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech.≅ *Id*.; *see also United States v. Raines*, 362 U.S. 17, 21 (1960) (AThis Court, as is the case with all federal courts, >has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.≅).

As this Court has stated:

> In order to mount a facial challenge to a statute, the challenger must establish Athat no set of circumstances exists under which the Act would be valid.≅ *U.S. v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). It is not enough to show that under some conceivable circumstances the statute might operate unconstitutionally. *Id*. The Aoverbreadth≅ doctrine does not apply outside the limited context of the First Amendment. *Id*.

Artman v. State Bd. of Registration for Healing Arts, 918 S.W.2d 247, 251 (Mo. banc 1996);

see State v. Crawford, 478 S.W.2d 314, 319 (Mo. 1972) (ADefendant >may not espouse the cause of others differently situated as a defense in a prosecution where the statute clearly applies to him.=≅).

Here, of course, appellant does not argue that he had a speech right to engage in the conduct that underlay his criminal charges (that of manipulating his penis in front of two young children); thus, unlike the defendant in *Beine*, whose conduct of urinating in a public restroom was deemed Aconstitutionally protected,≅ appellant cannot rely on the overbreadth doctrine to invalidate ə 566.083.1.(1).

AThe fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an >overbreadth= doctrine outside the limited context of the First Amendment.≅ *United States v. Salerno*, 481 U.S. 739, 745 (1987).[5] In short, unless appellant can show that ə 566.083.1.(1) was unconstitutional as applied to his conduct, he has no standing to bring this claim. *State v.*

[5] Exceptions to the standing requirement should be rare and tied to important societal interests such as free speech or, for example, freedom of assembly (both of which are First Amendment rights). *See e.g. City of St. Louis v. Burton*, 478 S.W.2d 320, 321-323 (Mo. 1972) (finding a Aloitering≅ ordinance unconstitutionally overbroad and vague). Here, of course, appellant has not identified a First Amendment right (or other important societal) interest that removes him from the necessity of showing that he has standing.

Kerr, 905 S.W.2d 514, 515 (Mo. banc 1995) (an appellant Ahas no standing to raise other hypothetical instances in which the statute might be unconstitutionally applied≅).[6] And, here, appellant cannot show that, as to his conduct, the statute was unconstitutionally applied.

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[6] It should be noted that the majority in *Beine* did not hold otherwise. The Court cited to two cases to suggest that the overbreadth doctrine could be asserted outside of the First Amendment context, but it ultimately concluded that Mr. Beine could raise the claim because *his own conduct* was lawful. *State v. Beine*, 162 S.W.3d at 487-488 (Athe aspect of the overbreadth doctrine . . . that of allowing an appellant to take advantage of the doctrine because of the effect of the statute on others, even though the appellant=s conduct may not represent protected speech, has no application here, because this appellant was engaging in lawful, and necessary, conduct≅).

3. Appellant=s conduct of manipulating his penis in front of two young children was constitutionally prohibited by ə 566.083.1.(1)

Under the relevant portion of the statute,

> 1. A person commits the crime of sexual misconduct involving a child if the person:
>
> (1) Knowingly exposes the person=s genitals to a child less than fourteen years of age in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age[.]≅

ə 566.083.1.(1), RSMo Cum. Supp. 2004. In *Beine,* the Court observed that the defendant had merely urinated in a public restroom; the Court stated:

> [I]t is not clear that Mr. Beine had no right to do what he did. The evidence that the state introduced at trial essentially showed only that Mr. Beine used a public restroom while boys were present and stood at a little further distance from the urinal than men usually do, and that Mr. Beine accidentally turned around without zipping his pants zipper up to discipline some boys that were causing a disturbance in the restroom. This is constitutionally protected conduct, so even if the overbreadth doctrine did not apply to this case, Mr. Beine can still contest the constitutionality of the statute by arguing that it prohibits conduct to which he is constitutionally entitled to engage in.

State v. Beine, 162 S.W.3d at 487. But the same cannot be said of appellant=s conduct.

As the record shows, while appellant was babysitting D.H. and C.H., appellant offered to show the victims something, and he then proceeded to expose and manipulate his penis in front of them, giving himself an erection (Tr. 183-184, 208, 221-222, 241-243, 272). Appellant said his penis was Agrowing,≅ and he wanted the boys to touch his penis (Tr. 184, 243). He asked D.H. to rub his penis, but D.H. said that was Agross≅ and ran into his bedroom (Tr. 271-272). This conduct was not, by any stretch of the imagination, constitutionally protected conduct. It was not, as the majority thought of Mr. Beine=s conduct, Alawful, and necessary, conduct.≅ In short, the statute plainly put appellant on notice that exposing his penis to two young boys in that manner was not lawful.

4. Section 566.083.1.(1) is not facially unconstitutional or vague[7]

Appellant also cannot establish that ə 566.083.1.(1) is facially unconstitutional. To show facial unconstitutionality, appellant must show that there is no conceivable set of circumstances under which ə 566.083.1.(1) is valid. As the United States Supreme Court has explained: AA facial challenge to a legislative Act is, of course, the most difficult challenge

[7] Other than citing to *Beine*, appellant does not identify any constitutional challenge to the statute; thus, respondent will simply address the challenges made in *Beine*.

to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.≅ *United States v. Salerno*, 481 U.S. at 745.

Here, the majority in *Beine* essentially stated that ə 566.083.1.(1) is not unconstitutional on its face when it observed that Athe statute prohibits two types of conduct: some of which a person has no right to engage in and the other of which a person has a right to engage in.≅ *State v. Beine*, 162 S.W.3d at 486. However, the majority then seemed to indicate that part of the statute B that part which required the defendant to expose his genitals Ain a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than fourteen years of age≅ B was unconstitutionally vague because it did not have a culpable mental state. *Id*. at 486 (AThe only express statutory requirement of knowing conduct is that of knowingly exposing one=s genitals to a child less than 14 years of age.≅). But as the dissent in *Beine* pointed out, there is another reasonable reading of the language in question. *Id*. at 490-492 (Stith, J., dissenting).

AThe test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.≅ *State ex rel. Zobel v. Burrell*, 167 S.W.3d at 692. ANeither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague.≅ *Id*.

Here, ə 566.083.1.(1), RSMo Cum. Supp. 2004, *did* require that a defendant act Aknowingly≅ as to the conduct that formed the basis for violation of the statute. The relevant

portion of the statute stated:

> A person commits the crime of sexual misconduct involving a child if the person:
>
> 1. *Knowingly exposes the person=s genitals* to a child less than 14 years of age *in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than 14 years of age*.

ə 566.083.1.(1), RSMo Cum. Supp. 2004 (emphasis added). There is no punctuation or any other indication in subdivision (1) to suggest that Aknowingly≅ does not modify the entire sentence. *See State v. Beine*, 162 S.W.3d at 490-491 (Stith, J., dissenting).

Moreover, as the dissenting opinion in *Beine* observed, A[t]he meaning of the italicized portion of the statute has been addressed previously by this Court, albeit in *dicta*, in *State v. Moore*, 90 S.W.3d 64, 67 (Mo. banc 2002).≅ *State v. Beine*, 162 S.W.3d at 490. In *State v. Moore*, the Court rejected an argument that another statute, ə 566.095.1, was unconstitutionally vague because it made solicitation of sexual conduct a crime if done Aunder circumstances in which he knows that his requests or solicitation is likely to cause affront or alarm.≅ 90 S.W.3d at 67. In discussing the constitutionality of ə 566.095.1 as to child victims, the Court compared it to ə 566.083.1, the statute at issue here, and to another statute using similar language. The Court in *Moore* noted that both of the latter statutes Aprohibit conduct *that is known or believed* >likely to cause affront or alarm=, presumably to

distinguish a criminal act of exposing oneself from conduct that is accidental, inadvertent, or otherwise done without an intent to do harm.≅ *Id*. at 68 (emphasis added). The Court concluded this was sufficiently specific to avoid constitutional challenge.

This reading of ə 566.083.1.(1) was correct. The word Aknowingly≅ as used in section 566.083.1.(1) applies to the entire sentence in which it appears; nothing limits its application to only the first portion of that sentence. The statute does not merely require the State to present evidence that the defendant knowingly exposed his genitals to a child less than fourteen years old. To the contrary, this single sentence requires that a defendant knowingly exposed his genitals to a person under fourteen in a manner that would cause a reasonable adult to believe that the conduct was likely to cause affront or alarm to a child of less than fourteen years. If the person does not knowingly act in this manner, he has not violated the statute. Thus, ə 566.083.1.(1) is not vague or unconstitutional on its face.[8]

[8] In addition to the analysis offered by the dissent in *Beine*, it should be noted that the absence of a mental state is not a proper gauge for determining whether a statute is facially unconstitutional. When there is no mental state, one can be supplied (or not) by operation of əə 562.021 and 562.026, RSMo 2000.

D. Conclusion

In sum, *State v. Beine* notwithstanding, there is no binding precedent that has declared ə 566.083.1.(1) unconstitutional. The case in *Beine* was wholly resolved by the Court=s unequivocal determination that the evidence was insufficient on all four counts; thus, any further analysis regarding the constitutionality of ə 566.083.1.(1) was unnecessary and, therefore, non-binding *dicta*.

Additionally, for the reasons discussed above, respondent submits that the secondary analysis of *Beine* should not be followed. Appellant lacks standing to raise an overbreadth challenge, except as the statute was applied to his own conduct; appellant has made no showing that he was only engaged in constitutionally protected conduct; and the language of ə 566.083.1.(1), RSMo Cum. Supp. 2004, was sufficiently definite to inform appellant that it was unlawful to expose his penis to his two young victims in the manner that he exposed it. This point should be denied.

II.

The trial court did not abuse its discretion in allowing Andrea Douglas and Charles Heavel to testify that they would be Asurprised≅ to hear that D.H. had hit someone in response to being told that he could not do something he wanted to do, because the challenged testimony was not an improper or speculative opinion.

In his second point appellant contends that the trial court abused its discretion in allowing Andrea Douglas and Charles Heavel to testify Athat they would be >surprised= to hear that [D.H.] would react by hitting if told that he could not do something≅ (App.Sub.Br. 23). Appellant argues that their testimony was Ain the nature of hypotheticals and was thus merely the witnesses= speculative opinions as to [D.H.=s] possible future behavior, which lay opinions were not admissible to show that [D.H.] behaved in accordance with those opinions on a particular occasion≅ (App.Sub.Br. 23).

But appellant=s claim is not well taken. The testimony in question did not hypothesize that D.H. would never (or did not) hit appellant in response to being told that he could not play Nintendo (appellant testified that the victim had attacked him after being told that he could not play Nintendo); rather, the testimony was designed to reveal the generally non-violent nature of the victim B a fact that D.H.=s father and aunt could testify to based on their personal observations of the victim B and thereby cast doubt on the veracity of appellant=s story. Moreover, to the extent that D.H.=s father and aunt=s testimony revealed that D.H. was not violent (and thereby might have suggested that D.H. had not, in fact, hit appellant),

appellant was not prejudiced, because other properly admitted testimony from D.H.=s father and aunt also revealed D.H.=s non-violent nature.[9]

A. The Standard of Review

The trial court has broad discretion to admit or exclude evidence, and the appellate court will reverse only upon a showing of a clear abuse of discretion. *State v. Simmons*, 944 S.W.2d 165, 178 (Mo. banc 1997). A trial court abuses its discretion when a ruling is Aclearly against the logic and circumstances before the court and is so arbitrary and

[9] Respondent would note that in arguing this point appellant asserts that the state improperly Abolstered and vouched for [D.H.=s] testimony≅ by presenting Ahearsay≅ and other testimony that allegedly vouched for D.H.=s credibility (App.Sub.Br. 23-24). These claims are not included in appellant=s point relied on, and he offers no analysis or authority for his conclusory assertions. To the extent that appellant is attempting to raise those claims, respondent submits that they are without merit.

unreasonable as to shock the sense of justice and indicate a lack of careful consideration[.]≅ *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

B. The Testimony of D.H.=s Father and Aunt Was Not Impermissible Opinion Testimony

To provide context for the testimony in question, it must first be noted that the state knew that appellant was going to portray the victim as a petulant child who lashed out violently when told that he could not play Nintendo. This defense theory was laid out for the jury in appellant=s opening statement (*see* Tr. 176), and it was later confirmed by appellant=s testimony (Tr. 321). Accordingly, although appellant does not contest the relevancy of such evidence, respondent would note that it was proper to address this aspect of the defense theory, particularly because appellant put his credibility in issue by testifying. *See generally State v. Williams*, 828 S.W.2d 894, 900 (Mo.App. E.D. 1992) (evidence of the victim=s peaceful nature was admissible where the defendant had, in his confession, portrayed the victim as a violent individual); *see also State v. Branch*, 757 S.W.2d 595, 600-601 (Mo.App. E.D. 1988) (although evidence of the victim=s prior bad act related to the victim=s character, it was admissible in part because it bore upon the defendant=s credibility).

The challenged testimony was elicited from D.H.=s aunt, Andrea Douglas, as follows:

Q Now, if [D.H.] B hypothetically, if [D.H.] did not get his way B

[Defense counsel]: I=m going to object to any hypothetical question being posed to this witness.

THE COURT: Go ahead and complete your question. Please don=t respond, Ms. Douglas.

Q (By [the prosecutor]) If [D.H.] didn=t get his way and he wanted to play with a certain toy or something, would it be uncharacteristic of him to get mad and punch somebody?

THE COURT: I=ll sustain the objection to the hypothetical.

Q (By [the prosecutor]) Okay. Would you be surprised to learn that if [D.H.] was mad because he didn=t get his way, that he would punch somebody?

[Defense counsel]: Same objection, your Honor. It=s still a hypothetical.

THE COURT: Overruled. You may answer.

[Andrea Douglas]: Yes, I would be surprised.

(Tr. 211). Later, D.H.=s father, Charles Heavel offered the following testimony:

Q Now, if you were told that if [D.H.] didn=t get his way, he wanted to play with a toy or something, and he didn=t get his way, so he got mad and punched somebody, would you be surprised by that?

A Very.

[Defense counsel]: Your Honor, I=m going to make the same objection. This is a hypothetical.

THE COURT: Overruled.

[Charles Heavel]: I would be very surprised.

(Tr. 223-224).

Rather than contesting the relevance of this testimony, appellant argues that it was an improper lay opinion (App.Sub.Br. 23). AGenerally, a lay witness is allowed to testify about facts within his or her personal knowledge, but may not express opinions.≅ *State v. Sanders*, 842 S.W.2d 916, 919 (Mo.App. E.D. 1992). AIt is also not proper for a lay witness to state a conclusion concerning the ultimate issue for the jury, or to give an opinion as to another person=s real or actual state of mind.≅ *State v. Dixon*, 70 S.W.3d 540, 548 (Mo.App. W.D. 2002).

AWhen a witness has personally observed events, he may testify to his >matter of fact= comprehension of what he has seen in a descriptive manner which is actually a conclusion, opinion or inference, if the inference is common and accords with the ordinary experiences of everyday life.≅ *State v. Ramsey*, 710 S.W.2d 459, 461 (Mo.App. E.D. 1986). Additionally, Athere is a recognized difference between an objectionable opinion or conclusion of a witness on a material fact not the subject of proof by opinion evidence, and those answers of a witness concerning things difficult of description in which answers the witness uses language conveying his >matter of fact=, >cause and effect= comprehension of things he has seen which were like those he had often theretofore personally observed in the ordinary experience of everyday life.≅ *State v. Ryan*, 275 S.W.2d 350, 352 (Mo. 1955).

Here, appellant asserts that Athe State was allowed to have two witnesses speculate as to whether [D.H.] would hit someone if he were told he could not [do] something he wanted

to do≅ (App.Sub.Br. 25). But that is not what the witnesses said. They did not opine that the victim had not hit appellant, or that the victim would not have hit appellant under the circumstances contained in the questions posed; rather, they simply indicated that if they learned that the victim had hit someone when he was not allowed to do something he wanted to do, they would be Asurprised≅ by that information (Tr. 211, 223-224). This was simply a shorthand method of allowing the witnesses to state that, to their knowledge, the victim had a non-violent nature B a fact that was based upon personal observations and that would have been difficult to fully explain without offering a multitude of details gleaned from years of observations. Indeed, this is the very nature of reputation evidence offered by any lay witness. And, inasmuch as appellant=s (anticipated) testimony attempted to portray the victim as a petulant child who was prone to violence, the victim=s reputation along those lines was relevant and admissible.

C. Because Other Similar Evidence Was Admitted Without Objection, Appellant Cannot Show Prejudice

Appellant also cannot show, even if the evidence was improperly admitted, that he was prejudiced by the testimony of D.H.=s father and aunt that they would have been Asurprised≅ upon learning that the victim had reacted violently to being told no. A conviction will not be reversed because of improper admission of testimony unless the defendant is prejudiced. *State v. Evans*, 992 S.W.2d 275, 290 (Mo.App. S.D. 1999). The burden is on defendant to show both error and the resulting prejudice before reversal is

merited. *Id*.

A conviction will be reversed due to admission of improper evidence only if the defendant proves prejudice by showing a reasonable probability that in the absence of such evidence the verdict would have been different. *Id*. In addition, a defendant suffers no prejudice and cannot complain about the admission of evidence over objection where similar evidence is admitted without objection. *Id*. (citing *State v. Nastasio,* 957 S.W.2d 454, 459 (Mo.App. W.D. 1997)).

Here, the victim=s non-violent nature was also shown, almost entirely without objection, by other testimony from D.H.=s father and aunt, who testified that they had never seen D.H. hit an adult, that D.H. had never hit them, and that D.H. had never responded violently when told Ano≅ (Tr. 211-212, 224).[10] Thus, to the extent that evidence of the victim=s non-violent nature was important to the jurors in reaching their conclusions, other similar evidence was available for them to consider; and, accordingly, appellant cannot show that he was prejudiced by the challenged evidence. This point should be denied.

[10] The trial court overruled one Arelevance≅ objection during Heavel=s testimony, when the prosecutor asked how D.H. responded to being told Ano≅ (Tr. 224).

CONCLUSION

In view of the foregoing, respondent submits that appellant=s convictions and sentences should be affirmed.

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 7,181 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of August, 2006, to:

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